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Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

NO. _____

JAMES A. GORDON, JR.,

Petitioner,

vs.

WILLIAM W. DAVIS, et al,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES A. GORDON, JR.
Petitioner in Pro Se
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53pp

QUESTIONS PRESENTED FOR REVIEW

I

WHETHER THE DISTRICT COURT HAS SUBJECT MATTER JURISDICTION OVER NEWLY DISCOVERED EVIDENCE WHICH WAS NOT DISCLOSED IN TIME NOR BY DUE DILIGENCE COULD NOT HAVE BEEN DISCOVERED IN TIME FOR PRESENTATION FOR CONSIDERATION BY THE CALIFORNIA SUPREME COURT?

II

WHETHER STATE BAR OFFICIALS OR OFFICERS MUST DEMONSTRATE THAT THEIR CONDUCT DOES WARRANT QUASI-JUDICIAL IMMUNITY?

III

WHETHER OFFICERS OF THE JUDICIAL BRANCH OF THE STATE ARE IMMUNE FROM PROSPECTIVE INJUNCTIVE RELIEF?

IV

WHETHER THE ELEVENTH AMENDMENT IMMUNITY BARS A TITLE 42 U.S.C. §1983 ACTION AGAINST STATE OFFICERS IN THEIR PERSONAL AND INDIVIDUAL CAPACITIES?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

NO. _____

JAMES A. GORDON, JR.

Petitioner,

vs.

WILLIAM W. DAVIS, individually and Staff Attorney for the California State Bar; ROBERT K. SCOTT, individually and Investigation Referee for the California State Bar; STATE BAR OF CALIFORNIA, a Public Corporation; LAURENCE P. GILL, Clerk of the Supreme Court of the State of California; SUPREME COURT OF THE STATE OF CALIFORNIA; Honorable ROSE ELIZABETH BIRD; Honorable STANLEY MOSK; Honorable OTTO KAUS; Honorable ALLEN BROUSSARD; Honorable CRUZ REYNOSO; Honorable JOSEPH GRODIN; Honorable MALCOLM M. LUCUS; and STATE OF CALIFORNIA;

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner, James A. Gordon, Jr., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on February 2, 1987.

OPINION BELOW

The Court of Appeals entered its Memorandum decision affirming the District Court's order of dismissal on February 2, 1987. A copy of the memorandum is attached as Appendix A.

The Court of Appeals denied petitioner's petition for rehearing on February 27, 1987. A copy of the order is attached as Appendix B.

JURISDICTION

The judgment of the Court of Appeals

for the Ninth Circuit was entered on February 2, 1987. The order denying the petition for rehearing was entered on February 27, 1987. This petition is filed within 90 days of that order. The jurisdiction of this Court is invoked under Title 28, U.S.C., Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XIV, provides in part as follows:

> Nor shall any State deprive any person of life, liberty or property, without due process of law....

Title 42, U.S.C., Section 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF CASE

Appellant was ordered disbarred by the California Supreme Court on July 1, 1982 and had no prior disciplinary record.

Petitioner filed a first amended complaint in the Federal District Court, Central District of California, for damages and injunctive relief, alleging four counts of deprivations of Civil Rights under color of law, pursuant to Title 42 U.S.C. §1983 and the Fifth and Fourteenth Amendments to the United States Constitution, alleging the Court's jurisdiction pursuant to Title 28 U.S.C. §1343 and §1331.

Respondents filed motions to dismiss and the motions were granted for lack of subject matter jurisdiction; the Eleventh Amendment immunity afforded to the States, their agencies and officers; and absolute immunity of judges performing their judicial functions.

Petitioner was admitted to the California State Bar and the Federal District Court Bar in June 1961, and practiced law as a sole practioner. Petitioner was admitted to the United States Supreme Court Bar in August 1973. In July 1973, petitioner entered into a law partnership with two other lawyers, for the general practice of law.

In 1975, when petitioner discovered that a partner or partners had misused or commingled clients funds, petitioner dissolved the partnership; moved his offices; and assumed those obligations owing to the clients, even though he did not know the full extent thereof nor as to all the persons owed. Petitioner did desert nor abandon the clients.

In late 1975 and thereafter, petitioner found himself in the position of having assumed a greater total of

obligations than he had knowledge of, at the time of his assumption. Petitioner then found himself in severe financial difficulties and under extreme pressure to meet the demands of payment.

In 1976, clients complained to the State Bar, in response, petitioner informed the State Bar of the partnership relation, the partners, his discovery of the commingling, his moving of his offices and the assumption of those obligations owing to the clients, even though he did not know the full extent thereof. These complaints were investigated and were terminated by the Staft Attorneys for want of merit and/or insufficiency and petitioner was so notified.

This case involves two separate disciplinary proceedings. The First matter, indexed as L.A. 31396 and the Second matter, indexed as L.A. 31535.

Count I of the amended complaint, petitioner alleged that in 1978, another and different Staff Attorney, Respondent William W. Davis, hereinafter referred to as Davis, set investigation hearings as to complaints, being the First matter. At said hearing, petitioner stated all of the particulars concerning his partnership, his dissolution of same and the assumption of the obligations owing to the clients, even though he did not know the full extent nor to all the persons entitled to any payment.

A Notice to Show Cause was filed, alleging wilful misconduct, and a hearing was set before the Hearing Panel.

On April 9, 1980, the Hearing Panel filed their decision recommending that petitioner be actually suspended from the practice of law for a period of ninety (90) days, with probation and conditions.

The Review Department adopted the recommendations of the Hearing Panel and recomsame to the California Supreme Court.

Respondent Davis had openly stated his displeasure with the recommendation and on April 29, 1980, set hearings, as to the Second matter. Davis, alleged six (6) matters, four (4) matters which were the 1976 complaints that had been investigated by the State Bar and terminated by the then Staff Attorneys, and were barred from further proceedings pursuant to the State Bar Rules of Procedure, Rules 508, 511 and 512. At said investigation hearing, objections to the realleging of these matters were made, pursuant to the Rules. A copy of said aforementioned Rules are are attached as Appendix C, D and E.

In light of and with knowledge of, Investigation Referee, Respondent Robert K. Scott, hereinafter referred to as Scott,

acting alone or in conspiracy with Davis, on May 9, 1980, filed a Notice to Show Cause, alleging wilful misconduct, as to all six (6) matters, which included the four (4) barred matters. Davis and Scott knew that they and the State Bar did not have any authority nor jurisdiction over these four (4) matters.

On June 27, 1980, petitioner filed an answer to the Notice to Show Cause, raising the bar to these four (4) matters. The Notice to Show Cause was not dismissed and a new filing as to the remaining complaints, but the original Notice to Show Cause was presented to the Hearing Panel on February 11, 1981, read, signed and entered into the record by the Panel. The hearing commenced on that date, and after objections as to four (4) matters was made, the hearing recessed for the preparation of an amended Notice to Show

Cause, which was filed without the withdrawal or the original Notice to Show Cause.

During the recess Davis offered a prepared stipulation as to facts, which he represented would only be used to narrow the issues as to the burden the State Bar had to prove, but would not be used as an admission of culpability nor offered as such. Pursuant to said representations, the stipulation was executed, not knowing Davis's true intent. Davis offered the stipulation as an admission of culpability and supported same and in support referred to the pending matter, which was the First matter that was coming before the Supreme Court. Over objections the Panel accepted the stipulation as an admission of culpability and adopted as their findings of fact, solely on the stipulation. At no time did Davis deny the terms of the stipulation as represented nor offer to

withdraw the stipulation.

Subsequent to the hearing the Panel filed their decision recommending actual suspension of two hundred and ten (210) days, with probation and conditions, to run concurrent to any suspension ordered by the Supreme Court in the First matter. In addition to the findings, solely on the stipulation, the Panel found:

> None of the (petitioner's clients lost money or were otherwise prejudiced by the acts of (petitioner). (Petitioner) did not engage in the foregoing acts with either the knowledge or the intent that his clients, or any of them, would suffer financial or other damage or prejudice as a result thereof.

Before the Review Department on July 9, 1981, Davis brought to the attention of the Department, consisting of twelve (12)

members, all of the terminated matters and why the State Bar did not proceed thereon and that these matters demonstrate a basic failure in moral character, over a number of years. A copy of his statement, as reported, is attached as Appendix F.

Such statement was prohibited by the State Bar Rules of Procedure, Rule 573, which provides: that records of complaints or formal charges against the member are inadmissible on behalf of the State Bar, provided, if the member introduces evidence that no complaints or charges have been made, then the records are admissible in rebuttal. (emphasis added)

When one of the members of the Review Department questioned the sufficiency of the record, as against the petitioner, Davis, asked to reply, in doing so, Davis, stated facts, as true, that he knew were not true, nor part of the record,

from which petitioner could defend himself. A copy of this statement, as reported, is attached as Appendix G.

On August 19, 1981, the Review Department filed their decision, which did not adopt the recommendations of the Hearing Panel, but recommended, to the Supreme Court, that petitioner be actually suspended from practice for two (2) years, to run consecutive to any period ordered in the First and pending matter.

Petitioner in Pro Per, petitioned the Supreme Court for review, which was granted.

Petitioner prayed for equitable relief and money damages as against Davis and Scott, in their individual capacities.

Count II of the complaint alleges the State Bar's failure to cause an investigation of his former partners, pursuant to State Bar Rules of Procedure, Rule 574.

At the time of petitioner's formal hearing, one of his former partners was undergoing investigative and formal hearings, and as a result, the former partner resigned their membership with the State Bar. Rule 574 imposes a duty upon the Hearing Panel and Review Department to cause an investigation or refer to any investigation or formal proceeding in which the other member has been or is involved. Said investigation would not abate the formal proceedings. A copy of Rule 574 is attached as Appendix H.

Petitioner prayed for equitable relief.

Count III of the complaint alleges the State Bar's failure to perform under the mandatory duty pursuant to State Bar Rule 271, and have the reporter's transcript prepared and make a copy available to the petitioner for preparation of his

petition and defense, and copies for the Supreme Court's examination and review. Rule 271, as pertinent here, provides:

> All hearings in formal proceedings shall be reported in shorthand or shall be recorded by electronic equipment and methods approved by the board of governors. In all trial or trial-type hearings an original and two copies of a transcript shall be prepared at the State Bar expense:
>
> (a) when a recommendation is made to the Supreme Court for discipline or other affirmative action.
>
> A transcript prepared at State Bar expense shall be available, upon request, for use by the member or the member's counsel.

Petitioner prayed for equitable relief.

Count IV of the complaint alleges

that both matters, the First, L.A. 31396 and the Second, L.A. 31535, were consolidated for hearing before the Supreme Court, and further alleges that petitioner was not notified of the hearing date before the Court, even though he was in Pro Per in the Second matter, L.A. 31535 and filed the petition for review, and was not present to be heard.

Petitioner prayed for equitable relief.

REASONS FOR GRANTING WRIT

THE FEDERAL COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THE SUPREME COURT; IN CONFLICT WITH DECISIONS OF OTHER FEDERAL COURT OF APPEALS; AND IN CONFLICT WITH DECISIONS OF THE NINTH CIRCUIT COURT OF APPEALS ON THE SAME ISSUES

The California Supreme Court held in Emslie v. State Bar of California (1974)

11 Cal 3d 210, 113 Cal Rptr 175,

> State Bar disciplinary proceedings are administrative but of a nature of their own. It has been repeatedly held that they are not governed by the rules of procedure governing civil and criminal litigation, although such rules have been invoked by the courts when necessary to insure administrative due process. The right to practice one's profession is sufficiently precious to surround it with a panoply of legal protection. The Rules of Porcedure enacted by the State Bar provide a wide array of procedural safeguards in addition to those otherwise provided by statute or the courts. (at 183)
>
> The holder of a license to practice law is subject to suspension or disbarment for wilful breach of the rules of professional conduct or laws warranting disbarment, suspension or other discipline. The license may not be arbitrarily taken away and the holder is entitled to procedural due process in any disciplinary proceedings relating thereto. (at 185)

The furtherance of their opinion,

Court referred to In re Ruffalo (1968)

390 U.S. 544, which held:

> That where administrative proceedings contemplate the deprivation of

> a license to practice one's profession they are adversary proceedings of a quasi-criminal nature and procedural due process must be afforded the licensee. (at 185-186)

In Court II petitioner alleged that he was denied the rights pursuant to the State Bar Rule of Procedure, Rule 574.

The California Supreme Court in their opinion in Gordon v. State Bar (1982) 31 Cal 3d 748, 183 Cal Rptr 861, acknowledged mitigating circumstances (at 753) that petitioner contends he was under extreme financial pressure because of the dissolution of his law partnership and his assumption of partnership obligations to clients. That petitioner did not personally handle client's funds; entrusting his law partner with the task; but the usual discipline for such a breach is disbarment, in the absence of strong mitigating circumstances. (Citations)(at 757).

Moreover, the court made reference

to petitioner's conduct commencing in 1974 through 1979. In 1974 the partnership was still in existence and petitioner's discovery was in mid 1975, which cause him to dissolve the partnership.

Where the court supports its opinion with the above, creates a greater demand that he is entitled to the operation of Rule 574, because in 1974 and part of 1975, other members were involved.

The appellant practiced law for 12 years, as a sole practioner, before entering into a partnership to practice law. There was no prior record of discipline. The partnership was the orgin, the root and the cause of petitioner's problems. He did not abandon the clients when he discovered the commingling.

The fact that the former partner resigned their membership with the State Bar was the first knowledge that petitioner

received concerning any proceedings as against the former partner. Officers of the State Bar had known the idenity of petitioner's former partners, from 1976 though his various hearings, but withheld this information from the Hearing Panel, the Review Department and the petitioner, that said former partner was undergoing investigation hearings and formal proceedings during the time of petitioner's formal proceedings. The first knowledge that petitioner received concerning the former partner, was in the November 1984 publication, "The California Lawyer", a State Bar publication.

The disclosure of this fact was not in time nor by due diligence could have been discovered for presentation to the California Supreme Court for their consideration. Moreover, petitioner was prevented from raising this issue in his

response to the Notice to Show Cause why he should not be disbarred from the United States Supreme Court Bar, which was ordered in October 1983.

The Court of Appeals cited Worldwide Church of God v. McNair, 805 Fed 2d 888 (9th Cir. 1986) as their most recent reiteration that Federal District Courts have no jurisdiction to hear a §1983 action that requires review of a final state court proceeding, however, the opinion cites, District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 and refers to Robinson v. Ariyoshi, 753 Fed 2d 1468, 1472 (9th Cir. 1985) as containing the court's only detailed discussion of Feldman's language.

> In Robinson the court held that faced with the task of deciding our power to review constitutional issues which arise from a state court proceeding, we view the res judicata requirement of full and fair opportunity to litigate, and

> the Feldman "inextricably inter wined" barrier to federal jurisdiction as two sidesof the same coin. Under the rubric of either "jurisdiction" or "res judicata," the crux of the question is whether there has already been actual consideration of and a decision on the issue presented. If consideration and decision have been accomplished, action in federal court is an impermissible "appeal" from the state court decision. If no consideration has been given, or any decision on the matter is ambiguous, it is unlikely that the issues presented to the state high court and to the federal court are so "inextricably interwined" that the federal court cannot take jurisdiction. Nor is it likely that there will have been a full enough and fair enough opportunity for litigation to warrant the claim preclusive effect of res judicata.

In the instant case there was no failure upon the petitioner's part to raise the issue of his former partner's resignation as a result of State Bar proceeings against the former partner, because such issue was not known. The rule that the District may not assume jurisdiction over tne issue is limited and the ruie can only

apply where the petitioner had a reasonable opportunity to raise his federal claim in the state proceeding, Wood v. Orange County 715 Fed 2d 1543 (11th Cir. 1983) Cert. denied, 467 U.S. 1210, 104 S. Ct. 2398 (1984), Haring v. Prosise (1983) 462 U.S. 306.

In Worldwide Church of God (supra) the California Superior Court considered and rejected the plaintiff's argument that was raised in Federal Court, and the cases in support of the Court of Appeals opinion are in conflict with the decisions offered by petitioner.

The District Court has jurisdiction to review the deprivation pursuant to Rule 574.

QUASI-JUDICIAL IMMUNITY

In Imbler v. Pachtman, 424 U.S. 409 (1976) and in Butz v. Economou, 438 U.S. 478, this Court extended quasi-judicial

immunity for prosecutors, whether in judicial proceedings or administrative proceedings, but only extends the immunity only to acts committed within his jurisdiction and authority and it does not extend to protect the prosecutor acting in clear absence of jurisdiction.

A state official claiming immunity from liability under Title 42 U.S.C §1983 has the burden of demonstrating his entitlement thereto, Dennis v. Sparks (1980) 449 U.S. 24, 29, Butz v. Economou (1978) 438 U.S. at 506

The Ninth Circuit has been consistent with this Court's application of immunity theory insulating prosecutors, but have required test to be followed in order to determine whether the prosecutor demonstrates his entitlement thereto.

The immunity available depends not on an official's job title or agency, but

on the function that person was performing when taking the actions that provoked the lawsuit, and bears the burden of proving that public policy requires exemption of that scope, and that responsibilities of his office embrace function so sensitive as to require a total shield from liability. Bothke v. Fluor Engineers and Constructors, Inc., 713 Fed 2d 1405 (9th Cir. 1983); but does not extend to a parole officer to the dissemination of false information concerning a parolee, Anderson v. Boyd, 714 Fed 2d 906 (9th Cir. 1983); thus , when a court official acts in a capacity in which he is not called upon to exercise judicial or quasi-judicial discretion, he is not entitled to absolute immunity, and the one claiming immunity has the burden of demonstrating entitlement to it, Richardson v. Koshiba 693 Fed 2d 911 (9th Cir. 1982); we must look beyond the status of the party

seeking immunity and consider the nature of the conduct for which immunity is sought, Gregory v. Thompson 500 Fed 2d 59 (9th Cir. 1974).

In the instant case Davis and Scott must demonstrate what authority and what jurisdiction did they and the State Bar have over the barred matters, that they filed.

Davis, must demonstrate that it was part of his prosecutional duties to falsely represent the purpose and intent of the stipulation to induce the execution thereof.

Davis, must demonstrate that his bringing to the attention to the Review Department, all of the terminated and barred matters, was for rebuttal as a shield and not as a sword.

Lastly Davis, must demonstrate that misleading the Review Department as to

untrue facts, in violation of his oath as an officer of the court, as part of his duties and within his authority.

The primary policy of extending quasi-judicial immunity to prosecutors is to ensure independent and disinterested prosecutorial decisionmaking, but the policy should not and does not extend to the conduct as alleged in Count I.

ABSOLUTE JUDICIAL IMMUNITY

In Pulliam v. Allen, 466 U.S. 522 this Court stated:

> We never had had a rule of absolute judicial immunity from prospective injunctive relief, and there is no evidence that the absence of that immunity has had a chilling effect on judicial independence. (at 536)
>
> Congress intended §1983 to be an independent protection for federal rights and find nothing to suggest that Congress intended to expand the common-law doctrine of judicial immunity to insulate state judges from federal collateral review.
>
> We conclude that judicial immunity is not a bar to prospective injunc-

> tive relief against a judicial officer acting in her judicial capacity. (at 541)

This Court indicated that seven Circuits have indicated that there is no immunity to bar such relief, including the Ninth Circuit, note 6, page 528, Richardson v. Koshiba, 693 Fed 2d 911 (9th Cir. 1982)

ELEVENTH AMENDMENT IMMUNITY

Spruytte v. Walters, 753 Fed 2d 498 (6th Cir. 1985) recognized in Scheuer v. Rhodes, 416 U.S. 232 (1974) is the foundation for determining whether a claimant may mantain a federal court action for damages against state officials in their individual capacities in constitutional violations.

The Scheuer Court explained: (at 237)

> Ex Parte Young, 209 U.S. 123 (1908) teaches that when a state officer acts under a state law in a manner violative of the Constitution, he 'comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is sub-

jected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States.'

In Demery v. Kupperman, 735 Fed 2d 1139 (9th Cir. 1984) Cert. denied 105 S Ct 810 (1985) held:

> That damage actions under 42 U.S.C. §1983, seeking to impose individual and personal liability on state officials are not barred by the Eleventh Amendment. (at 1146)

Demery went further to hold that neither Edelman v. Jordan (1974) 415 U.S. 651 nor Pennhurst State School and Hosp. v. Halderman (1984) 465 U.S. 89, changes the well-settled rule tat the Eleventh does not bar suits seeking damages for violation of federal law from State officials personally.

Demery and Ronwin v. Shapiro, 657 Fed 2d 1071 (9th Cir. 1981) held:

> A money judgment against state officials in their individual capacities would not be paid from the public treasury and a state may not manufacture immunity for its employees by agreeing to indemnify them.

The immunity of a Bar Association does not extend to equitable relief pursuant to a 42 U.S.C. §1983 action, Slavin v. Curry, 574 Fed 2d 1256 (5th Cir. 1978).

The California Supreme Court is an indispensible party since only that court has the power to disbar and only upon that court could the federal court issue an order. Clark v. Washington, 366 Fed 2d 678 (9th Cir. 1966).

CONCLUSION

For the forgoing reasons, petitioner James A. Gordon, Jr. respectfully requests that a writ of certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit.

DATED: May 22, 1987

Respectfully submitted,

JAMES A. GORDON, JR.
Petitioner in Pro Se
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(213) 295-0234

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

NO._____

JAMES A. GORDON, JR.,
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vs.

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Respondents.

AFFIDAVIT OF SERVICE

I hereby declare that on the 22 day of May 1987, I served three copies of the Petition for Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit by enclosing them in a sealed envelope, postage prepaid, in the U.S. Mail at Los Angeles, CA addressed as follows:

JOHN K. VAN DE KAMP, Attorney General
State of California
HENRY G. ULLERICH, Supervising Deputy
3580 Wilshire Boulevard
Los Angeles, California 90010

HERBERT M. ROSENTHAL
ROBERT M. SWEET
General Counsel, California State Bar
1230 West 3rd Street
Los Angeles, California 90017

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Los Angeles, California on the 22 day of May 1987.

JAMES A. GORDON, JR.
Petitioner in Pro Se

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Filed:

2/2/87

JAMES A. GORDON, JR.,	)	No. 86-5541
Plaintiff-Appellant	)	DC# CV-85-
v.	)	4251-ER
WILLIAM W. DAVIS, et al.,	)	MEMORANDUM
Defendants-Appellees.	)	

Appeal from the United States District Court for the Central District of California, Edward Rafeedie, District Judge, Presiding, Argued and Submitted 12/4/86, Pasadena, California.

Before: SNEED, and SCHROEDER, Circuit Judges, and MARQUEZ, District Judge.

The district court's order of dismissal is affirmed. Appellant's suit is a misuse of the Civil Rights Act, 42 U.S.C.§1983.

California disbarred appellant. His only federal remedy for that action, however, was to petition the United States Supreme Court for direct review. An original action in district court, styled as a §1983 claim, is improper and unavailing. Mackay v. Nesbett, 412 F.2d 846 (9th Cir.) (per curiam), cert denied, 396 U.S. 960 (1969); Clark v. Washington, 366 F.2d 678, 680-81 (9th Cir. 1966). Federal district court, as we have just recently reiterated, have no jurisdiction to hear a §1983 action that requires review of a final state court proceeding. Worldwide Church of God v. McNair, 805 F.2d 888, 890-91, 893 n.4 (9th Cir. 1986).

In addition, quasi-judicial immunity forecloses appellant's damage claims against state bar attorney Davis and investigative referee Scott, see Sellars v. Procunier, 641 F.2d 1295, 1303 (9th Cir),

cert. denied, 454 U.S. 1102 (1981); Clark, 366 F.2d at 681, absolute judicial immunity bars his actions against the indivdual justices of the California Supreme Court, Pierson v. Ray, 386 U.S. 547, 554-55 (1967), and the Eleventh Amendment forbids his claims against the State of California, the State Bar of California, and the California Supreme Court, O'Connor v. Nevada, 686 F.2d 749, 750 (9th Cir.) (per curiam), cert denied, 459 U.S. 1071 (1982).

Appellant's invocation of Fed. R. Civ. P. 60(b) is without merit. The rule, with respect to relief available on motion, has no bearing on (although it does not prohibit) relief in one court from the judgment of another. Bankers Mortgage Co. v. United States, 423 F.2d 73, 77-79 (5th Cir.), cert. denied, 399 U.S. 927 (1970).

Other grounds for dismissal exist. There is no need to mention them, however.

AFFIRMED.

UNITED STATE COURT OF APPEALS

FOR THE NINTH CIRCUIT

Filed:

2/27/87

JAMES A. GORDON, JR., Plaintiff-Appellant, v. WILLIAM W. DAVIS, et al., Defendants-Appellees.	)	No. 86-5541 DC# CV-85-4251-ER ORDER

Before: SNEED, and SCHROEDER, Circuit Judges, and MARQUEZ, District Judge.

Appellant's petition for rehearing is denied.

AIPENDIX B

RULE 508

I the staff attorney concludes (i) there is no legal ground for action by the State Bar, or (ii) there is lack of sufficient proof to support a determination of reasonable cause for issuance of a notice to show cause, the staff attorney may terminate the matter and inform the complainant of such action. In other instances, the staff attorney may notify the member, orally or in writing, of the acts, transaction or matter under investigation, and fix a time within which the member may submit a written explanation. On the basis of information received from the member, or other information, the staff attorney may terminate the matter on either or both of the grounds stated above, and inform the complainant and the member of such action.

APPENDIX C

RULE 511

Except as provided in Rule 512, the decision of a staff attorney or of an investigation referee (with or without the holding of an investigation hearing) that a formal proceeding shall not be instituted is a bar to further proceedings against the member based upon the same alleged facts.

APPENDIX D

RULE 512

The rule stated in Rule 511 does not apply if the decision of the staff attorney or of the investigation referee is expressly stated to be without prejudice to further proceedings; or if in the case of a decision by a staff attorney, the chief trial counsel determines within two years of such determination that further investigation should be conducted; or if further proceedings are ordered by the Board of Governors Committee or the Board of Governors, upon request. A request for further proceedings may be made by a complainant or by chief trial counsel, after a decision of a staff attorney or an investigation referee described in Rule 511. Such request shall be filed with the State Bar within three months after the mailing of notice of the decision to the complainant; provided, for

good cause, the Board of Governors Committee may act upon a complainant's or chief trial counsel's request for further proceedings if it is filed not later than two years after such mailing.

APPENDIX E-2

HEARING OF JULY 9, 1981 BEFORE THE REVIEW DEPARTMENT OF THE STATE BAR COURT

MR. DAVIS: "The stipulation reflects a change in the number of counts that were originally included in that Notice to Show Cause. There were several counts that were severed off, and the reason they were severed off was because the period of time that had elapsed between the investigation stage and the issuance of the Notice to Show Cause was rather lengthy, but the more important reason was that the matters had been closed at the investigation stage by a Staff Attorney, and pursuant to the rules that govern reopening matters that had been previously closed out.

First of all I should indicated to the Review Department my purpose in mentioning the particular files that did not proceed through the First Amended Notice to Show Cause which was filed and signed

by the Hearing Panel was certainly not to alert you to other files which were floating around, and may or may not have been available to prosecute against Mr. Gordon. The original Notice to Show Cause included those particular matters, and it was determined after that particular notice had been prepared and filed that there was a very strong possibility, based upon the Rules of Procedure that exist, that we could not proceed on those matters, and they were not closed out without prejudice, therefore they were removed, and the matter went forward on the First Amended Notice to Show Cause which is before you also was entered with respect to those matters only. There was no intent on my behalf or on behalf of the State Bar to try and build a stronger case by pointing out matters which had been closed out. I think what we have here is a demonstration over a

number of years of a basic failure in moral character."

APPENDIX F-3

MS. ANAGNOS: "The findings indicated that no one had lost any money, and the clients had not lost money, and I really wanted to specifically ask if a good check was given to Mr. Cassini eventually, and if the doctor in relation to the Smith case had been fully paid, and so forth.

MR. GORDON: Yes, those matters have all been paid.

MS. ANAGNOS: They have all been paid?

MR. GORDON: Yes. In the Smith case once I found out the doctor was not going to send in the medical with the insurance company I paid him because I was holding the money for him. In the Cassini matter he resubmitted the check,

and it was paid.

MS. ANAGNOS: So that isn't in the findings?

MR. DAVIS: If I might address that, I think it should be considered also -- I agree that restitution has been made -- but in each case I believe the Review Department should realize that restitution was made under the gun, so to speak, during the pendency and after Mr. Gordon had been notified of a complaint with the State Bar.

RULE 574

If, during a formal proceeding, it appears to the hearing panel or the Review Department upon review that another member may have committed acts of misconduct in the same matter or transaction, it shall either file with the chief trial counsel a recommendation that an investigation be commenced of the conduct of the other member, or, in its decision, refer to any investigation or formal proceeding in which the other member has been or is involved, according to the facts. The formal proceeding shall continue without abatement.

APPENDIX H

Supreme Court, U.S.
FILED
JUN 3 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

NO. 86-1884

JAMES A. GORDON, JR.,

Petitioner,

vs.

WILLIAM W. DAVIS, et al,

Respondents.

SUPPLEMENTAL PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JAMES A. GORDON, JR.
Petitioner in Pro Se
4300 Sutro Avenue
Los Angeles, CA 90008
(213) 295-0234

8 pp

APPENDIX

DISTRICT COURT ORDER

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Entered:

12/9/85

JAMES A. GORDON, JR., Plaintiff, v. WILLIAM W. DAVIS, et al Defendants.	NO. CV 85-4251 ER(JRx) ORDER GRANTING DEFENDANTS' MOTION TO DISMISS FIRST AMENDED COMPLAINT

This matter came before the Honorable Edward Rafeedie, United States District Judge, on November 12, 1985 on defendants' motion to dismiss the first amended complaint. After considerating all arguments, written and oral, the court dismissed plaintiff's complaint with prejudice.

PARTIES

The plaintiff is James A. Gordon, who was disbarred by the California Supreme

Court on July 1, 1982. The defendants are William W. Davis, a staff attorney for the State Bar of California; Robert K. Scott, an investigation referee for the State Bar court; State Bar of California; the State of California; Laurence P. Gill, Court Clerk to the California Supreme Court; and the following members of the California Supreme Court: Honorable Rose Bird; Honor- Stanley Mosk; Honorable Otto Kaus; Honorable Allen Broussard; Honorable Cruz Reynoso; Honorable Joseph Grodin; and Honorable Malcolm M. Lucas.

Plaintiff seeks a mandatory injunction ordering the defendants to reinstate his right to practice law in the State of California, as well as damages.

Pursuant to Federal Rule of Civil Procedure 12(b)(1) dismissal is proper as to all defendants for lack of subject matter jurisdiction. Federal Courts lack subject

matter jurisdiction to entertain challenges to final state disciplinary orders. MacKay v. Nesbett, 412 F. 2d 846 (9th Cir. 1969); U.S. cert. denied at 396 U.S. 960, 396 U.S. 1004. See also, Mayes v. Honn, 542 F.2d 822, (10th Cir. 1976).

An alternative basis for granting defendants' motion to dismiss as to the State of California, the California Supreme Court, the State Bar of California and defendants Davis and Scott, is the Eleventh Amendment. With regard to the State of California and the California Supreme Court, when the state or one of its agencies is named as a defendant, regardless of the relief sought, the Eleventh Amendment acts as a bar to suit. Pennhurst State School and Hospital v. Halderman, 104 S.Ct. 900 (1984). Likewise, because the State Bar is a constitutional agency in the judicial branch of the government which acts as an

administrative arm of the California Supreme Court, the Eleventh Amendment immunity applies. O'Connor v. State of Nevada, 686 F.2d 749 (9th Cir. 1982). Lastly, the Eleventh Amendment is also a bar to suit against state officers, Scott and Davis. Edelman v. Jordan, 94 S.Ct. 1347, 1355 (1974).

In addition, dismissal is proper with respect to the individual members of the California Supreme Court pursuant to Federal Rule of Civil Procedure 12(b)(6). In a §1983 action, absolute immunity applies to judges performing their judicial functions. Pierson v. Ray, 386 U.S. 547, 554-555 (1967).

Accordingly, the court hereby

ORDERS that this action be dismissed with prejudice as to all defendants.

The Court further orders the Clerk to serve copies of this Order on all parties

by the United States mail.

DATED: December 5, 1985.

/s/ Edward Rafeedie
EDWARD RAFEEDIE

United States District Judge

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

NO. 86-1884

JAMES A. GORDON, JR.,
Petitioner,

vs.

WILLIAM W. DAVIS, et al,
Respondents.

AFFIDAVIT OF SERVICE

I hereby declare that on the 29th day of May 1987, I served three copies of the Supplemental Petition for Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit by enclosing them in a sealed envelope, postage prepaid, in the U.S. Mail at Los Angeles, CA addressed as follows:

JOHN K. VAN DE KAMP, Attorney General
State of California
HENRY G. ULLERICH, Supervising Deputy
3580 Wilshire Boulevard
Los Angeles, California 90010

HERBERT M. ROSENTHAL
ROBERT M. SWEET
General Counsel, California State Bar
1230 West 3rd Street
Los Angeles, California 90017

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Los Angeles, California on the 29th day of May 1987.

JAMES A. GORDON, JR.
Petitioner in Pro Se

Supreme Court, U.S.
FILED
JUN 25 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

NO. 86-1884 (3)

JAMES A. GORDON, JR.,

Petitioner,

vs.

WILLIAM W. DAVIS, et al,

Respondents.

MEMORANDUM OPPOSING CERTIORARI

HERBERT M. ROSENTHAL
555 Franklin Street
San Francisco, CA 94102
(415) 561-8200

ROBERT M. SWEET
P.O. Box 61150
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MEMORANDUM OPPOSING CERTIORARI

Petitioner is a former California attorney who was disbarred by order of the Supreme Court of California on July 1, 1982, as reported in Gordon v. State Bar of California, 31 Cal.3d 748, 647 P.2d 137, 183 Cal. Rptr. 861 (1982). Instead of timely seeking review of that order by this Court pursuant to 28 U.S.C. §1257 (1987), petitioner some three years later filed a so-called civil rights (i.e., 42 U.S.C. §1983) action in the United States District court for the Central District of California alleging that in the attorney disciplinary proceedings conducted by respondent State Bar of California and in the subsequent proceedings before respondent Supreme Court of California to review the report and recommendations of the State Bar, petitioner was denied a fair hearing in violation of his federal constitutional rights to due

process and equal protection. Named as defendants in the action were the State Bar and the California Supreme Court, the State Bar staff attorney who presented the charges against petitioner, the State Bar hearing officer who preliminarily considered the complaints against petitioner and decided that formal charges should be brought, the Clerk of the California Supreme Court and the individual justices of the Court who were sitting at the time and who reviewed petitioner's matter and ordered that he be disbarred. By his prayer petitioner sought injunctive relief in the form of the federal district court's order requiring that the defendants "...reinstate [petitioner's] right to practice law in the State of California..."; and in addition petitioner sought recovery of $1,000,000 compensatory and $1,000,000 punitive damages from each of

the defendants for the alleged deprivation of his federal constitutional rights.

It is respectfully submitted that the United States Court of Appeals for the Ninth Circuit correctly concluded in its unpublished memorandum opinion that the district court properly dismissed petitioner's action and that petitioner's suit was a "...misuse of the Civil Rights Act..." As this court recently affirmed in D.C. Court of Appeals v. Feldman, 460 v.s. 462, 482-486 (1982), federal district courts have no authority (i.e., subject matter jurisdiction) to review final determinations of state high courts in attorney admission and disciplinary proceedings. Quite clearly petitioner's first amended complaint in his civil rights action did not present a general challenge to the constitutionality of state bar disciplinary rules, but sought to reverse the application of the rules in

his particular case. Accordingly, it was properly dismissed.

Finally, it is submitted that consistent with well established law, the Ninth Circuit correctly concluded that each of the defendants was absolutely immune from liability for damages in plaintiff's civil rights action under the doctrine of judicial acts (i.e., quasi-judicial) immunity. As the Ninth Circuit noted, while other grounds for dismissal existed, there was no need to mention them.

The instant petition for writ of certiorari is not well founded and should be denied.

Dated: 6/22/87

Respectfully submitted,

HERBERT M. ROSENTHAL
ROBERT M. SWEET

By Robert M. Sweet

Attorneys for Respondents
William W. Davis
James K. Scott and the
State Bar of California

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

NO. 86-1884

JAMES A. GORDON, JR.
Petitioner,

vs.

WILLIAM W. DAVIS, et al,
Respondents.

PROOF OF SERVICE

I hereby declare that on the 25 day of June 1987, I served three copies each of the within Memorandum Opposing Certiorari by enclosing them in sealed envelopes, postage prepaid, in the U.S. Mail at Pasadena, CA addressed as follows:

JAMES A. GORDON, JR.
Petitioner Pro Se
4300 Sutro Avenue
Los Angeles, CA 90008

HENRY G. ULLERICH
Supervising Deputy Attorney General
3580 Wilshire Boulevard
Los Angeles, CA 90017

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Pasadena, California on the 25 day of June 1987.

Robert A. Sweet

FILED
JUL 25 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

NO. 86-1884

JAMES A. GORDON, JR.,
Petitioner,

vs.

WILLIAM W. DAVIS, et al,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO

THE NINTH CIRCUIT COURT OF APPEALS

PETITIONER'S REPLY

JAMES A. GORDON, JR.
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A brief reply is warranted to correct several assertions contained in the Memorandum in Opposition.

1. Respondent's memorandum fails to recognize the fact that the resignation of one of petitioner's former partners was not made public by the State Bar until November 1984, which by due diligence could have discovered in time to move for a new trial, or review by this court pursuant to a Writ of Certiorari. The resignation was a result of hearings before the State Bar Court, during the time of petitioner's hearings and such information was confidential, as to petitioner, pursuant to State Bar Rule of Procedure, Rule 221.

As an alternative to review, by the District Court, petitioner offered the Court of Appeals the right of relief by a Independent Action pursuant to Section 60(b) of the Federal Rules of Civil

Procedure, which is a proper procedure as to Newly discovered Evidence.

2. Petitioner's action was filed seven (7) months after the publication of his former partner's resignation and within the three (3) year limitation for a 42 USC §1983 action.

3. This "so called" civil rights action, 42 USC §1983, is supported by this Court's opinions in Monroe v. Pape (1961) 365 U.S. 167, Lugar v. Edmondson Oil Co. (1982) 457 U.S. 922 and Scheuer v. Rhodes (1974) 416 U.S. 232, moreover, the Ninth Circuit in 1962 in Marshall v. Sawyer, 301 F 2d 639 at 646, set down the requirements for a sufficient complaint under Section 1983, as follows:

> "The only elements which need to be present in order to establish a claim for damages under the Civil Rights Act are that the conduct complained of was engaged in under color of state law, and that such conduct subjected the plaintiff to the deprivation of rights, privileges, or immunities secured by the Constitution of the United States."

These requirements were cited in Roberts v. Acres, 495 F 2d 57 at 59 (7th Circuit, 1974) as for the sufficiency of the complaint under Section 1983.

Monroe v. Pape (supra) also ruled that to be compensable under Section 1983, an act need not have been committed with "a specific intent to deprive a person of a federal right," and that a civil remecy, Section 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his action." (365 U.S. at 187)

4. The respondent merely cites quasi-judicial immunity as a bar to the action as against Davis and Scott and does not contest that the cases cited in the petition, by this court and the Ninth Circuit, are without merit. Davis and Scott must therefore demonstrate their entitlement to the immunity.

5. The memorandum in opposition stated the Ninth Circuit's recognition of other grounds for dismissal, which were not stated, and it leaves us to speculation.

The affirmative defenses of Res Judicata, including the thories of issue and claim preclusion and/or direct or collateral estoppel, and the Statute of Limitations, would not be sufficient grounds, because:

Res Judicata only applies when the issues were actually litigated or available for litigation, but not raised. Migra v. Warren City School Dist. Bd. of Ed. (1984) 465 U.S. 75; and does not apply where the party did not have a full and fair opportunity to litigate the claim or issue, decided by the first court, Haring v. Prosise (1983) 462 U.S. 306.

The Federal Courts accept the state's interpretation of its own statutes of limitations, Smith v. Cremins, 308 F 2d 187

(9th Circuit, 1962); and California classifies a Section 1983 action under California Code of Civil Procedure §338(1) as having a limitation period of three (3) years. The original complaint filed by petitioner was within time and subsequently amended.

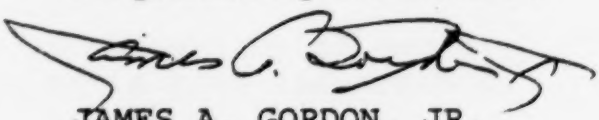
Neither affirmative defense would apply or operate in this matter.

CONCLUSION

The petition for certiorari should therefore be granted. The error of the Court of Appeals for the Ninth Circuit is clear, and petitioner believes the appropriate relief would be the summary reversal of the decision.

DATED: July 18, 1987

Respectfully submitted,



JAMES A. GORDON, JR.
Petitioner in Pro Se

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

NO. 86-1884

JAMES A. GORDON, JR.,
Petitioner

vs.

WILLIAM W. DAVIS, et al,
Respondents.

AFFIDAVIT OF SERVICE

I declare that on the 20th day of July 1987, I served three copies each of the within Petitioner's Reply by enclosing them in sealed envelopes, postage prepaid, in the U.S. Mail at Los Angeles, CA, addressed as follows:

JOHN K. VAN DE KAMP, Attorney General
State of California
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HERBERT M. ROSENTHAL
ROBERT M. SWEET
General Counsel, California State Bar
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Pasadena, California 91106

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Los Angeles, California on the 20th day of July 1987.

JAMES A. GORDON, JR.
Petitioner in Pro Se